Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-893

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & CO.,

Defendant-Appellant,

-against-

SHEARSON, HAMMILL & CO., INC.,

Plaintiff-Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & CO.,

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Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION OF APPELLEE TO DISMISS OR AFFIRM

The Appellee moves this Court to dismiss the appeal herein or, in the

alternative, to affirm the judgment of the Court of Appeals of the State of New York on the grounds that said appeal does not present a substantial Federal question, is not in conformity with 28 U.S.C. 1257(2), and the issues herein are moot.

I. THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT.

Appellant expressly relies on 28 U.S.C. 1257(2) as the jurisdictional basis for this appeal "inasmuch as the State of New York Court of Appeals has decided in this case the question of the constitutional validity of the New York Attachment Statute, Article 62 of the New York Civil Practice Law & Rules, and the decision in its favor". (Jurisdictional Statement p.2)

It is well settled law that review by the Supreme Court is precluded unless it is shown that the state court actually decided the federal question, and that the decision of the federal question was necessary to the state court's determination of the cause. Chouteau vs. Gibson, 111 U.S. 200, 43 S.Ct. 340, 28 L.Ed. 400 (1883); First Nat. Bank vs. Estherville, 215 U.S. 341, 30 S.Ct. 152, 54 L.Ed. 223 (1910); Whitney vs. People of the State of California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1926); Honeyman vs. Hanan, 300 U.S. 14, 57 S.Ct. 350, 81 L.Ed. 476 (1936).

The New York Court of Appeals in deciding this case below said:

> "Motion to dismiss the appeal herein granted...on the ground that no substantial federal

question is directly involved." (40 N.Y.2d 844, Jurisdictional Statement p.146a)

From the Court's language it is clear, despite Appellant's attempt to distort the meaning of the word "substantial" (Jurisdictional Statement p.24), that the Court did not reach the issue of the constitutionality of the New York Attachment Statute. The decision was on a motion to dismiss, in which the Appellee herein did not even argue the constitutionality of the Statute. Clearly if the Court wished to decide the constitutional question, it would have denied the motion and allowed Appellee to submit a brief on the constitutional question.

Therefore, since the highest court of the State of New York did not

decide the constitutionality of the New York Statute herein, it is respectfully submitted that this Court has no jurisdiction in this appeal. 28 U.S.C. 1257(2)

II. THE ISSUES PRESENTED HEREIN ARE MOOT.

The action herein was commenced by the obtaining of an order of attachment pursuant to Article 62 of the New York Civil Practice Law & Rules. Subsequent to the obtaining of the order of attachment, Appellant, on his own initiative, moved for an order to compel arbitration. This motion was granted and the parties proceeded to arbitrate the dispute. A decision and award was granted to Appellee herein. Thereafter, judgment was entered

upon the award in the arbitration proceeding.

The Appellant had a hearing in the arbitration proceeding and an opportunity to attack the confirmation of the award. The question of the validity of the attachment is a moot point in that the proceeds of the attachment were used to satisfy a duly entered judgment in favor of Appellee. Whether a separate action would have been commenced for the confirmation of the award of whether the confirmation took place in the then existing stayed action wherein the attachment was granted, had no material effect upon the outcome of the litigation. The Appellant had his day in court on all the issues, and the validity of the New York Attachment Statute is

irrelevant in this case.

This case is, therefore, moot; there is no controversy between the parties of "sufficient immediacy and reality" to justify review by this Court. Golden vs. Zwickler, 394 U.S. 103, 109, 89 S.Ct. 956, 22 L.Ed.2d 111. See also Kimball vs. Kimball, 174 U.S. 158, 161, 19 S.Ct. 639, 43 L.Ed. 932 (1899); Maryland Casualty Co. vs. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826.

Appellant tries to escape the fact that the issues he raises are moot by asserting that "[I]f the order of attachment were declared invalid Sloan would be entitled to recover at a minimum the poundage of $625." (Jurisdictional Statement p.25) The Court should note

that the poundage fee for the Sheriff is the same for "collecting money by virtue of an execution" and by virtue of "an order of attachment". (New York Civil Practice Law & Rules §8012(b)(1). Thus, Appellant is not entitled to receive even this in return if the Attachment Statute is declared unconstitutional. The judgment Appellee received upon the confirmation of the arbitration award was clearly a valid judgment. Neither Appellee nor the Sheriff receive a dollar amount in excess of the amount permitted had there been no attachment.

III. THE QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY RAISED.

Appellant herein is attempting to

get "two bites of the apple". After the lower courts of the State of New York denied Appellant's motion to vacate the attachment, the parties proceeded to arbitration. As noted above, the arbitrators awarded a decision to the Appellee upon which a judgment was later entered. Aggrieved with this result, Appellant then chose to appeal to the Supreme Court, Appellate Division of New York. Appellant now claims (Jurisdictional Statement p.26) that he raised the constitutional question "at the very earliest opportunity".

This statement is clearly false. New York Civil Practice Law & Rules §5701(a)(2)(i) provides:

> (a) An appeal may be taken to the Appellate Division as of

right...

(2) ...where the motion is decided...

(i) grants, refuses, continues or modifies a provisional remedy.

This clearly gives the right to appeal to an aggrieved party once the motion to vacate an attachment is decided.

Appellant claims he had the right to rely on the case of Richmond vs. Richmond, 41 A.D.2d 933, 344 N.Y.S.2d 52, 54 (Third Dept. 1973) which he interprets to mean that an appeal from an order denying a motion to vacate was not the proper proceeding in which to attack the consitutionality of the statute. The Appellant has misunderstood this case. That court refused to decide the constitutional issues because

"there are other avenues open to this court for a proper disposition of the appeal". Richmond vs. Richmond, supra. It is well settled law that a court will not decide the constitutional issues if there are other grounds upon which the case may be disposed of. Rescue Army vs. Municiple Court of the City of Los Angeles, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947).

Clearly, the Court in deciding the Richmond case was using this principle. In AMF Inc. vs. Alfo, 48 A.D.2d 352, 369 N.Y.S.2d 460 (Second Dept. 1975), the court accepted and decided an appeal based on constitutional issues from an order which denied a motion to vacate an attachment.

Furthermore, New York Civil

Practice Law & Rules §5602(b)(1) provides that non-final orders of the Appellate Division can be appealed by permission of the Court.

Thus, the Appellant could and should have appealed the decision of the lower court denying Appellant's motion to vacate the order of attachment. He did not, and instead chose to await the determination of the arbitrators. Only when the arbitrators decided in Appellee's favor and that decision was confirmed, did Appellant decide to appeal.

IV. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Appellant attempts to raise other alleged federal questions. None of these

have any merit, and would have no effect on the outcome of this litigation. The arguments discussed above clearly should dispose of this appeal. As the Court of Appeals pointed out, "no substantial federal question is directly involved" in this law suit. (Sloan vs. Shearson, Hammill & Co., Inc., 40 N.Y.2d 844, Jurisdictional Statement p.146a)

CONCLUSION

WHEREFORE, Appellee respectfully moves this Court to dismiss this appeal or, in the alternative, to affirm the judgment entered by the Court of Appeals of the State of New York.

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